

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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TQ DELTA, LLC, : CIVIL ACTION
Plaintiff, :
vs. :
ZYXEL COMMUNICATIONS, INC. :
and ZYXEL COMMUNICATIONS :
CORPORATION, :
Defendants. : NO. 13-2013 (RGA)

- - -

Wilmington, Delaware
Tuesday, December 19, 2017
10:04 o'clock, a.m.

- - -

BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

- - -

Valerie J. Gunning
Official Court Reporter

1 **APPEARANCES:**

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25 **- - -**

1 P R O C E E D I N G S

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09:48:06 3 (Proceedings commenced in the courtroom,
09:48:07 4 beginning at 10:04 a.m.)

09:54:30 5

09:54:30 6 THE COURT: All right. Good morning, and please
09:54:31 7 be seated.

09:54:31 8 This is TQ Delta versus ZyXel Communications,
09:54:37 9 Inc., Civil Action No. 13-2013.

09:54:42 10 For plaintiff, Mr. Farnan, good morning.

09:54:44 11 MR. FARNAN: Good morning, Your Honor. Brian
09:54:50 12 Farnan on behalf of the plaintiff, and with me is Jim
09:54:53 13 Murphy, and Peter McAndrew, all from McAndrews, Held &
09:54:56 14 Malloy.

09:55:00 15 THE COURT: All right. Good morning to you all.

09:55:03 16 MR. FARNAN: Thank you.

09:55:03 17 THE COURT: Mr. Dorsney?

09:55:04 18 MR. DORSNEY: Good morning, Your Honor. Ken
09:55:07 19 Dorsney from Morris James, and with me from Alston & Bird I
09:55:11 20 have Jennifer Liu and Elizabeth Rader.

09:55:14 21 THE COURT: All right. Good morning to you all.

09:55:16 22 Ms. Rader, do I presume you're making the
09:55:18 23 argument here?

09:55:19 24 MS. RADER: Yes, Your Honor.

09:55:20 25 THE COURT: All right. So before we begin, is

09:55:29 1 the U.K. court a troll friendly court?

09:55:33 2 MS. RADER: I would say yes, and I would say
09:55:35 3 that they would like to become more patent owner friendly
09:55:38 4 like the Eastern District of Texas used to be.

09:55:41 5 THE COURT: All right. Well, so I don't think
09:55:49 6 we really should -- you know, ad hominem sorts of things
09:55:59 7 don't really go too far, and so calling the other side a
09:56:02 8 patent troll and calling the U.K. Court a troll friendly
09:56:05 9 Court, that's not going to help you win. All right?

09:56:10 10 MS. RADER: Thank you.

09:56:11 11 THE COURT: And, Mr. Dorsney, I expect that if
09:56:15 12 you have time enough to review these briefs, and I
09:56:17 13 understand you don't always, that's the kind of thing that
09:56:20 14 you counsel your out-of-town counsel not to say.

09:56:27 15 MR. DORSNEY: Yes.

09:56:27 16 THE COURT: But I appreciate that you may not
09:56:28 17 have had the time.

09:56:29 18 All right, Ms. Rader. Go ahead.

09:56:31 19 MS. RADER: Your Honor, TQ Delta --

09:56:34 20 THE COURT: And actually, just on a different
09:56:37 21 point, what is the relief you actually seek? I say that
09:56:43 22 because the proposed order that came in, which I apparently
09:56:48 23 now misplaced with the original brief, proposed that I order
09:56:56 24 TQ Delta to withdraw or dismiss without prejudice its action
09:57:00 25 against ZyXel, essentially I guess ending the case in the

09:57:10 1 U.K.

09:57:10 2 MS. RADER: Well, we think it's not ending the
09:57:13 3 case. They could always refile since it's without
09:57:16 4 prejudice.

09:57:16 5 THE COURT: All right. So does that impact what
09:57:17 6 you are saying that the law suggests that I have the power
09:57:19 7 and discretion to do right now?

09:57:24 8 MS. RADER: I would say you have the power and
09:57:26 9 discretion to enter that injunction.

09:57:28 10 THE COURT: All right. And so that's what you
09:57:32 11 are seeking, that the injunction is to direct them to
09:57:34 12 withdraw or dismiss the case in the U.K.?

09:57:37 13 MS. RADER: Until such time as the issues that
09:57:39 14 are common to both cases can be resolved by this Court.

09:57:42 15 THE COURT: All right. So on a slightly
09:57:47 16 different topic -- I will get back to that. Go ahead.

09:57:54 17 MS. RADER: TQ Delta does not deny that it's
09:57:58 18 suing ZyXel in the U.K. because it is trying to get a remedy
09:58:02 19 that it cannot get in this court, the so-called FRAND
09:58:04 20 injunction, and that means based on Unwired Planet, if they
09:58:07 21 win on even one patent, the U.K. Court will determine a
09:58:11 22 FRAND license covering the whole TQ Delta DSL portfolio, and
09:58:18 23 it is worldwide. In that case, ZyXel wouldn't have the
09:58:22 24 luxury to wait and see if an injunction issued in the U.K.
09:58:25 25 or be enforceable in this court or other U.S. courts.

09:58:27 1 THE COURT: Do you think this injunction is
09:58:29 2 likely to issue under the worst case scenario before the
09:58:32 3 spring of 2019?

09:58:36 4 MS. RADER: I guess it could come out as soon as
09:58:40 5 January '19 under the worst case scenario.

09:58:42 6 THE COURT: All right.

09:58:43 7 MS. RADER: Obviously, we would hope to win on
09:58:46 8 the two patent on the liability issue.

09:58:47 9 THE COURT: Which might moot the whole thing.

09:58:50 10 MS. RADER: Indeed, but it's the threat hanging
09:58:52 11 over us that's causing irreparable harm, especially if our
09:58:55 12 customers were to find out about it and get nervous.

09:58:58 13 THE COURT: Is the proceeding a written secret?

09:59:01 14 MS. RADER: No.

09:59:02 15 THE COURT: So if your customers care, why would
09:59:07 16 they find out already?

09:59:08 17 MS. RADER: I'm not sure, but they have not.

09:59:10 18 THE COURT: Who are your customers? I mean, I
09:59:13 19 take it they're not Joe Q Public?

09:59:16 20 MS. RADER: They're mostly large ISPs or medium
09:59:21 21 sized ISPs, Internet service providers.

09:59:24 22 THE COURT: Right. Right. All right. Go
09:59:27 23 ahead.

09:59:27 24 MS. RADER: So we also think that the courts in
09:59:33 25 the European Union are likely to enforce U.K. issued

1 injunction, so getting an injunction would effectively be an
2 injunction all through Europe. So --

3 THE COURT: And under the best or worst case, or
4 under any case scenario, the limits of my authority are
5 pretty much the United States. Right?

6 MS. RADER: Correct. But TQ Delta is a United
7 States company, so they're under your jurisdiction.

8 THE COURT: Right. But, in other words, if
9 you're busy violating E.U. law, or more to the point, U.K.
10 law, and including that a patent, as I understand it, is
11 asserted against you that has not even got a counterpart
12 that's at issue here, don't they have an interest in
13 figuring out whether or not you do infringe it?

14 MS. RADER: The U.K. Court, yes, they do, but,
15 in fact, we believe that we are licensed anyway and that the
16 terms just need --

17 THE COURT: So you have defenses. That's what
18 litigation is for. Right?

19 MS. RADER: Right. So the harm that's
20 threatened to ZyXel could not be easily remedied after the
21 fact, but this Court does have the power to put the U.K.
22 action on hold just like the courts in Microsoft and
23 Realtek. The methodology for calculating royalties is also
24 different in the United Kingdom.

25 THE COURT: So if they have a different

1 methodology for calculating royalties -- well, never mind.

2 Go ahead.

3 MS. RADER: My point is just that this case was
4 brought here under U.S. law four years ago and it should
5 stay here, not be decided. This is a dispute between, it
6 used to be four, now three U.S. companies, so the center of
7 it is here even if there are a few U.K. patents asserted in
8 the U.K.

9 I'd like to read some language from the IP
10 Common Policy. Recommendations and deliverables, and those
11 are standards, are non-binding. Their objective is to
12 ensure compatibility of technology of their systems on a
13 worldwide basis. To meet this objective, which is the
14 common interest of all participating, it must be ensured
15 that recommendations and deliverables, their applications,
16 et cetera, are accessible to everybody.

17 And that's the reason that the majority of U.S.
18 courts that have considered this issue have concluded that a
19 holder of patent alleged to be standard essential -- and
20 that's alleged, they don't even have to be proved to be
21 standard essential -- cannot sue for injunctive relief
22 absent certain circumstances that aren't present here.

23 This is not a case where anybody says ZyXel is
24 guilty of holdout, and that is because TQ Delta didn't even
25 offer rates and terms to ZyXel before suing.

1 THE COURT: Well, so according to something, I
2 think Mr. Dorsney submitted it, but there was a copy of the
3 English Court's, or British Court's, the U.K. Court's
4 approved judgment, which I gather was from November 21st,
5 and Justice, the Justice said that they, TQ Delta made an
6 offer 26 May 2016, which is like a year-and-a-half ago, for
7 a global portfolio license which was rejected, and they say
8 that you made an offer for a global portfolio license which
9 has also been rejected. I take it that was some time after
10 May 26, 2016.

11 Is that all correct?

12 MS. RADER: I believe that is correct. I think
13 we admitted that in the U.K. case, but in this case, they
14 filed late in December 2013.

15 THE COURT: That's true.

16 MS. RADER: Before any concrete license had been
17 offered to us. They came to us and said, we think you'll
18 take an interest in this license to the standard essential
19 patents, you're practicing the standard. And so we came
20 back, said, yes, we'd like to talk about a license.

21 They said, tell us about your sales figures,
22 tell us about your profits, tell us about your costs so we
23 know what terms we can propose. They wanted to get a little
24 free discovery before filing.

25 We came back and said, we want an NDA, and then

1 the parties were negotiating the terms of an NDA for a few
2 months and then TQ Delta got tired of waiting. Perhaps they
3 already wanted to bring the 2Wire suit and the Zhone suit
4 and the Adtran suit at the same time. They gave us an
5 ultimatum and said, resolve the NDA by the day after
6 Thanksgiving weekend.

7 THE COURT: Yes. I remember that.

8 MS. RADER: Okay.

9 THE COURT: I'm not saying -- I'm just saying I
10 do remember that because, I don't know, the usual.

11 Well, so one of the questions that comes up is
12 why -- I mean, this has nothing to do, really, I guess, with
13 the motion today, but if they're busy making you an offer in
14 2016 and you made them an offer somewhere along the line,
15 why don't you all agree to an arbitrator or something and
16 let the arbitrator figure out where to split the difference
17 and resolve the matter.

18 MS. RADER: I'm not sure that's what anyone
19 wants. I mean, the parties have occasionally been
20 discussing settlement, but it hasn't gotten anywhere.

21 THE COURT: Right. Well, I mean, you know, I
22 have not figured out when the latest, how long this
23 litigation is going to last if it lasts until the end. I
24 gather the U.K. litigation might, the immediate might end
25 some time soon, but I gather, I saw somewhere in here that

1 if for some reason these two patents that are asserted fall
2 by the wayside, TQ Delta probably has more, so there's a
3 prospect of litigation into the future there, too.

4 If you can't negotiate a solution, why don't you
5 get some help?

6 MS. RADER: Actually, the scheduling order
7 states the case is referred for mediation, but for some
8 reason, nothing has ever come of that.

9 THE COURT: I don't know about that. All right.
10 Well, go ahead.

11 MS. RADER: So I was just reading you the public
12 policy of the ITU, and I was going to say that there's no
13 holdout here, so there's no exception to the general rule
14 that you can't get an injunction if you're asserting
15 supposedly standard essential patents. And enforcing these
16 policies is an important public interest. The U.S. is an
17 innovation economy. These issues are terribly important
18 worldwide, and you can't have standard setting organizations
19 have interoperability of these technologies unless everybody
20 plays by the rules. And Aware, TQ's predecessor, made these
21 declarations and then they sold patents to somebody else who
22 has no interest in complying with those rules.

23 So the U.K. action never should have been filed
24 in the first place. And I guess because it's only involved
25 in two patents, TQ Delta learned that asserting 32 patents

1 was going to slow them down, they thought they could get the
2 same result with two patents and then get quickly to a FRAND
3 determination. They jumped ahead of us. And we said, why
4 couldn't it be resolved in January of 2019 unless you do
5 something about it.

6 THE COURT: So let's assume for the sake of
7 argument that the U.K. Court gets to January 2019 and issues
8 some judgment saying that a FRAND rate is X and they issued
9 an injunction against TQ Delta, I'm sorry, against you that
10 included the United States, that you couldn't sell any
11 products in the United States or in the U.K. at the
12 worldwide FRAND rate. Would you agree that I would then be
13 bound by that?

14 MS. RADER: No, we don't.

15 THE COURT: Okay.

16 MS. RADER: But if we like the rate, we might
17 well take that license.

18 THE COURT: I'm sorry. I'm sorry. Could you
19 repeat that again?

20 MS. RADER: If we thought the U.K. issued FRAND
21 license rates and terms that were fair and reasonable, then
22 we have no reason not to take that. But if they were
23 unreasonable, I think we would have a good argument that
24 they wouldn't apply here even if the U.K. says they do. But
25 just enjoining our products to keep them out of the U.K. is

1 a huge sacrifice. That's a big market for us.

2 THE COURT: But, I don't know. I mean, it seems
3 to me, and maybe I'm wrong, but it seems to me that the U.K.
4 ought to be the one who gets to decide whether or not you
5 can sell products in the U.K. Right? Not me.

6 MS. RADER: I agree with that and that's why
7 we're asking that this just be enjoined while this Court is
8 working on the breach of contract issues, which may include
9 the, very likely include the FRAND rates and terms. After
10 that, absolutely. The U.K. Court should decide the U.K.
11 patent issues.

12 THE COURT: So let's assume for the sake of
13 argument -- so let me ask you this: One of the things that
14 seems to be suggested by the case from Philadelphia with
15 Judge Rufe and which seems to also be suggested in the last
16 page of your reply brief is that it's really premature to be
17 talking about this now? That there's things that could
18 happen between now and January of 2019, not the least of
19 which seems to be the possibility that the U.K. trial on
20 infringement may -- could go either way, and that the whole
21 thing might become moot.

22 If I followed the logic of Judge Rufe, who after
23 all was interpreting at least the same Third Circuit law
24 that I should be interpreting, wouldn't that suggest that I
25 do nothing now and wait to see what happens even if I agree

1 that somewhere down the road I should be entering an
2 injunction?

3 MS. RADER: I would say it's distinguishable
4 from the case in front of Judge Rufe, and the reason is that
5 I don't think they were faced with a threat of an injunction
6 in the, in that case.

7 THE COURT: No. They were faced with a default
8 judgment, but as Judge Rufe said, she respected the U.K.
9 Court to do justice, and I certainly would be inclined to
10 have the same approach. But she also said that when
11 circumstances were advanced and perhaps changed, she still
12 had some arrows in her quiver and could address the problems
13 then. I.

14 Mean, when you talk about comity, which seems to
15 be a big concern, doesn't that suggest not rushing in at the
16 first sign of smoke should shouldn't you wait until you see
17 whether there's actually a fire?

18 MS. RADER: I think if you wait to see when
19 there's a fire, it's too late. Once there has been a fire,
20 you can't build a house back again, and that's what we're
21 looking at here. The whole point of the IT public policy is
22 to prevent the threat of an injunction from helping the
23 patentholder force the settlement just because of having a
24 lever like threat of an injunction. So that's why this case
25 is different. The defendant in Judge Rufe's case was

1 basically it sounds like brought into the lawsuit so he
2 would be a witness. He was judgment proof. He couldn't
3 defend himself in the U.K. case. So I mean I think Judge
4 Rufe came to a right decision, but I don't think that
5 controls what should happen in this case.

6 THE COURT: All right. What's the relationship
7 between the parties that are actually defendants in the U.K.
8 and the two parties that are defendants here?

9 MS. RADER: ZyXel Communications Corporation,
10 which is one of the defendants here, is a parent company to
11 the ZyXel Denmark and ZyXel, Inc., which is in Anaheim,
12 California, and I think ZyXel U.K. is a subsidiary of the
13 Denmark entity.

14 THE COURT: And the ones who are defendants in
15 the U.K. are the ZyXel Denmark and ZyXel U.K.?

16 MS. RADER: Correct.

17 THE COURT: All right. And do you agree that
18 the two patents that are asserted in the U.K., one of them
19 does not have a counterpart here?

20 MS. RADER: I think it has a counterpart in the
21 same family.

22 THE COURT: But not a counterpart that's
23 asserted?

24 MS. RADER: I'm not a patent -- I mean, I'm not
25 a patent prosecutor, so sometimes the term counterpart is a

1 little confusing to me. It's related. I don't want to
2 overstate.

3 THE COURT: Okay. And the one that is
4 apparently more closely related, do you know what its, if
5 you're comfortable with the term in this situation, what its
6 counterpart is supposed to be?

7 MS. RADER: I want to say it's in Family 5, but
8 I'm not a hundred percent sure on that.

9 THE COURT: All right. Anything else?

10 MS. RADER: Sure. We recognize that the Third
11 Circuit standard is different than the Ninth Circuit
12 standard and that we have a tougher time making this
13 argument even though our facts are really, really
14 compelling, and we think the Ninth Circuit cases are really
15 important and persuasive, and that's why we cited them.
16 But in the alternative, this Court could take some steps to
17 take some of these issues back and put them on a faster
18 track.

19 THE COURT: Yes. I'm not going to do that.

20 Actually, I remember the other question I had in
21 mind here, which was, the U.K. Justice in the Court of
22 Chancery, is he something that presumably if his judgments
23 are in error, there's somebody that you can appeal it to?

24 MS. RADER: Yes, Your Honor. I understand that
25 the Unwired Planet case is up on appeal now.

1 THE COURT: So the law in Britain may not even
2 be what is -- what it is stated to be in the Unwired Planet
3 case?

4 MS. RADER: Anything could happen on appeal, but
5 I think the best way to win an appeal is to win the District
6 Court level case, and so we feel like the threat is here
7 now, sure. Anything could happen in the future, but the
8 threat of an injunction is the problem here, and that's
9 what's inconsistent with U.S. public policy.

10 THE COURT: Okay. And maybe I missed this.
11 Justice Carr, he's not the author of the Unwired Planet
12 decision, is he?

13 MS. RADER: No, he's not.

14 THE COURT: Okay. But he's just like Judge
15 Stark over there. He sits on the same Court as the Justice
16 who decided that?

17 MS. RADER: Exactly.

18 THE COURT: Okay.

19 MS. RADER: And all the parties in the case
20 management conference, which we provided the transcript of,
21 I really was cautious of the Unwired Planet case. In fact,
22 TQ Delta said that was one of the reasons why they filed in
23 the U.K.

24 THE COURT: Okay. Anything else?

25 MS. RADER: If there's no further questions, I

1 will submit, or reserve rebuttal.

2 THE COURT: All right. Go ahead. Mr. Murphy?

3 MR. MURPHY: Thank you, Your Honor. Good
4 morning.

5 Judge, we cited quite a few cases in our brief
6 that we have hard copies of. If the Court would like a
7 copy, I have copies to hand up to the Court.

8 THE COURT: I saw the hard copy of Brotech. I
9 assume the rest are available?

10 MR. MURPHY: They are all available, Judge. No?
11 Okay.

12 Judge, as you alluded to originally here, what
13 ZyXel is requesting is extreme relief. They are asking this
14 Court to grant an anti-suit injunction that will completely
15 shut down U.K. litigation to enjoin a U.K. Court from the
16 course of U.K. patents to stop infringement in the U.K.
17 It's an extreme remedy that this Court in the General
18 Electric case has said, quote, "Should almost always be
19 avoided."

20 And as you also alluded to, Judge, under Third
21 Circuit precedent, and, again, the Third Circuit has stated
22 that these parallel proceedings should always be allowed to
23 proceed at least until a judgment is won in one, set up as
24 res judicata to the other.

25 So, again, you mentioned it's premature,

1 certainly at least premature, and we agree. ZyXel, bottom
2 line though here, Judge, has failed to show any of the
3 prerequisites for an anti-suit injunction under the Third
4 Circuit's restrictive approach, it announced in the General
5 Electric case.

6 The first prerequisite is that the enjoining
7 Court have the same parties and be dispositive of the
8 enjoined Court, and ZyXel does not even argue or assert that
9 that is the case. So the first prerequisite is not met.
10 But if that prerequisite is met, then ZyXel would have to
11 argue that the U.K. litigation threatens jurisdiction of
12 this Court or threatens the important public policy of the
13 United States, and they fail to do those things as well.

14 THE COURT: I mean, I think they say that the
15 important public policy is that standard essential patents
16 shouldn't be used or shouldn't be the basis of an
17 injunction. Right? Isn't that what they are saying?

18 MR. MURPHY: That is one of the things they're
19 saying, Judge, and there are two responses to that. One is,
20 the FRAND bargain, if you will, is an important public
21 policy, but here, they mischaracterize the threat of an
22 injunction. There's a -- they say there's a policy in the
23 United States against injunctions for standard essential
24 patent holders, and as we've seen in the Federal Circuit
25 case that we cite to Your Honor, that's the Apple versus

1 Microsoft case, that says that there is no blanket
2 prohibition on injunctions for standard essential patent
3 holders. It's one element that goes into the standard
4 elements when looking at Rule 65, looking for an injunction,
5 whether or not to apply an injunction is just one more
6 factor. So there is no U.S. public policy against
7 injunctions for SEP holders. So that is not an important
8 public policy that could possibly be threatened by the U.K.
9 litigation. And this Judge, this Court Judge will decide
10 for itself those issues. The U.K. action will not impose
11 its will on this Court, so there's no threat to that public
12 policy whatsoever in this court.

13 But just to address one quick point, Judge. The
14 parties, excuse me, the defendant has asserted that there
15 is, isn't a prerequisite for the parties being the same
16 or --

17 THE COURT: I'm sorry. Did you say -- did you
18 cite Apple versus Microsoft as a Federal Circuit case?

19 MR. MURPHY: Yes.

20 THE COURT: Do you mean like versus Motorola?

21 MR. MURPHY: I'm sorry, Judge. Apple versus
22 Motorola, yes.

23 THE COURT: Okay.

24 MR. MURPHY: Sorry, Judge.

25 THE COURT: That's all right.

1 MR. MURPHY: Right. The Federal Circuit holding
2 that there is no blanket prohibition.

3 ZyXel argued that there is no initial
4 prerequisite for this case being dispositive of the U.K.
5 litigation to be entitled to an anti-suit injunction, but in
6 the General Electric case, Judge, where the Third Circuit
7 re-ratifies, if you will, the restrictive approach for
8 anti-suit injunctions, that case cites to the Second Circuit
9 and the Sixth Circuit cases, which state that standard and
10 state that the Second Circuit, the China Trade case, which
11 is cited at 837 F.2d at 36, where that Court identifies the
12 restrictive approach and says, we agree with the two
13 threshold requirements. One is the parties are the same;
14 and, two, whether the enjoining Court will be dispositive of
15 the enjoined Court. So there is that prerequisite for even
16 getting to the next prongs of the anti-suit injunction
17 factors.

18 THE COURT: Is it your position that the two
19 U.K. subsidiaries, or the two U.K. defendants, I guess is a
20 better word, they are not the same party, the same party as
21 the same parties here?

22 MR. MURPHY: Well, they are slightly different,
23 Judge, but they are all in the same family. We recognize
24 that. They're all related entities.

25 But here, the difference here, Judge, is the

1 reason this case would not be dispositive of that is the
2 lack of complete overlap of patented technology. You
3 mentioned it earlier. The patents, of course, in the U.K.
4 litigation are just U.K. patents. Here, they are just U.S.
5 patents, one of which in the U.K. is related to Family 5, as
6 you mentioned. The other patent asserted in the U.K.
7 presently is not what we would call Family 11, if you will,
8 but it's not asserted here. So there's no complete overlap
9 of technology or of patents.

10 THE COURT: So your position or view is one of
11 the asserted U.K. patents essentially has the same
12 limitations as one of the asserted Family 5 patents?

13 MR. MURPHY: Not the same limitations, Judge.
14 The same related specification based on the same technology,
15 but as you -- the patent law is different in the U.K., so
16 the claims would be a little different.

17 THE COURT: All right. And the other one, you
18 mentioned Family 11. I thought it was -- are you saying
19 it's related in some way to the Family 11 patents?

20 MR. MURPHY: Oh, I'm sorry, Judge.

21 THE COURT: Are there Family 11 patents?

22 MR. MURPHY: No. That's just our sort of how we
23 refer to it. And here in Delaware, there are only Families
24 1 through 10. I believe the ZyXel case deals with Families
25 1 through 9, if I have that right.

1 THE COURT: Okay.

2 MR. MURPHY: And so my point being that there's,
3 yes. The second patent in the U.K. litigation is not in any
4 way involved in these cases here.

5 THE COURT: All right.

6 MR. MURPHY: And so -- excuse me, Judge.

7 MR. McANDREWS: Sorry, Your Honor.

8 (Pause while counsel conferred.)

9 MR. MURPHY: And so the U.K. patent that's
10 outside the families here, TQ Delta doesn't even own a
11 counterpart in the U.S. for that patent. It's only in the
12 U.K. So, in other words, the point being that this case
13 won't be dispositive of the U.K. litigation and ZyXel
14 doesn't even argue that it would be, and so we don't get
15 past that first prerequisite for any anti-suit injunction.

16 Importantly, Judge, there is no threat to this
17 Court's jurisdiction from the U.K. litigation. As the
18 restrictive approach from the Third Circuit states, that's
19 one of the prongs that must be shown to be entitled to an
20 anti-suit injunction. There's no threat to the jurisdiction
21 here. The best that ZyXel argue is that the RAND issues in
22 the U.K. litigation may be decided first. They don't --

23 THE COURT: So what is your understanding of
24 what, in terms of RAND issues in the U.K. litigation, do --
25 what is your understanding of how much the issues there

1 overlap with the issues here?

2 MR. MURPHY: My understanding, Judge, is that
3 there's a fair bit of overlap between the FRAND bargain and
4 those issues that are related to that FRAND bargain.
5 However, they'll be applied locally by the U.K. litigation,
6 applying its U.K. jurisprudence, just like this Court will
7 apply the FRAND issues with the obligations, commitments of
8 the parties using U.S. jurisprudence.

9 THE COURT: So to the extent that the FRAND
10 obligation is based on some idea of the contract law and so
11 there's interpretation of a contract, what law am I supposed
12 to apply, what law is the U.K. supposed to apply to figure
13 out those issues?

14 MR. MURPHY: I can't speak to the U.K. law,
15 Judge. We've talked to our, of course, our lawyers in the
16 U.K. They'll apply a different law, I think the U.K.
17 contract law.

18 I will give you an analogy, Judge. In the
19 Microsoft/Motorola case that ZyXel relies on nearly
20 exclusively, in that case, the Court entered that injunction
21 against a proceeding for filing the bond for, in a German
22 Court, and one of the reasons it did that is because in
23 Germany, at least at that time, German courts did not
24 recognize third-party beneficiaries, and so Microsoft was
25 the implementer. They got the benefit of the FRAND bargain

1 as a third-party beneficiary here in the United States. The
2 Court recognizes that right if they meet certain
3 prerequisites and Microsoft met those prerequisites, and so
4 they're a third-party beneficiary able to assert those
5 contractual rights. In Germany, that's not allowed. So
6 that's why the different courts will look at different
7 things. In the U.K., we don't have that problem. The U.K.
8 as we know from the Unwired Planet case did an exhaustive
9 analysis of the FRAND issues and gave great respect to both
10 sides in showing commitment and obligations to both sides
11 trying to reach a FRAND reasonable and non-discriminatory
12 rate based on all circumstances. And so the U.K. will apply
13 as law, but it's very similar to ours, and there's no threat
14 to our jurisdiction or any policies, any FRAND policies in
15 the United States, because not only do they show respect for
16 the FRAND bargain, but this Court will also be able to apply
17 its sole discretion in how it interprets the FRAND
18 relationships.

19 THE COURT: Do you think the U.K. Court has the
20 power to enter an injunction that would have affected the
21 United States?

22 MR. MURPHY: I don't think -- my understanding,
23 Judge, is that a U.K. injunction is limited to the
24 geographic territory of the U.K., just as I think a U.S.
25 injunction is limited to the geographic territory of the

1 United States.

2 THE COURT: Do you have any authority for that
3 assertion?

4 MR. MURPHY: Judge, I wish I did. I've talked
5 to our U.K. lawyers about that. I don't have a citation for
6 you under U.K. law, but that is my understanding, that any
7 U.K. injunction will be limited to the geographic area of
8 the U.K.

9 THE COURT: So if you're right about that, then
10 your view is that an injunction -- if the U.K. Court
11 eventually entered an injunction against ZyXel Denmark and
12 ZyXel U.K., that would have -- you know, leave aside
13 questions of supply chain and things like that, but it would
14 have essentially no effect on the ability of the two
15 defendants in this case to sell, offer for sale, manufacture
16 in the U.S. whatever it is they do that you say infringes.
17 It would have no impact on that?

18 MR. MURPHY: You know, Judge, I can't give you a
19 straight answer to that. I don't know how an injunction
20 could be, you know, written in the U.K. that may or may not
21 have such an effect on any activities in the United States,
22 but we do know from things like the Brotech case that you
23 mentioned earlier, that there was a possibility of a default
24 judgment which presumably would turn into an injunction in
25 the U.K., and the District Court here said that doesn't

1 deprive the Court of jurisdiction, it doesn't warrant an
2 anti-suit injunction, because the Court here will look at
3 that and decide what it will in the U.S. And that's
4 important. This Court retains the ability to look at the
5 activities within its jurisdiction. So it still in that
6 case doesn't deprive anybody of jurisdiction or threaten any
7 public policy.

8 THE COURT: All right. What else do you have to
9 say?

10 MR. MURPHY: Pardon me, Judge?

11 THE COURT: Go ahead.

12 MR. MURPHY: Okay. And so on the issue of not
13 threatening jurisdiction, Judge, again, as the Brotech Court
14 said, quote, res judicata is not a doctrine which would
15 defeat subject matter jurisdiction, and so anything that
16 would happen in the ZyXel U.K. litigation doesn't deprive
17 this Court of jurisdiction, and so it can't support an
18 anti-suit injunction here.

19 The other issue, Judge, that parties argue, the
20 Third Circuit looks to for anti-suit injunctions is whether
21 or not there's a threat of an important public policy, and
22 again we're back to the FRAND issues that may get decided by
23 the U.K. litigation, and we talked about those.
24 Importantly, Judge, the only thing that ZyXel argues in its
25 brief is that they might be decided before the issues are

1 decided here. They don't state that those issues or
2 whatever decision happens to come out in the U.K. will be
3 imposed on this Court or this Court will not be able to
4 decide its own issues on the FRAND obligations and
5 framework. So again there's no threat to any public policy
6 in the United States.

7 U.K. laws will apply its own law, as you
8 mentioned, as you asked, and this Court will apply its own
9 laws to what the FRAND obligations are.

10 THE COURT: Ms. Rader said, and I'm sure she's
11 correct that the Unwired case is on appeal. Do you know
12 anything about the timing of that appeal?

13 MR. MURPHY: I do not, Judge. While Ms. Rader
14 has rebuttal, I will talk to co-counsel and see if I can get
15 an answer for you.

16 THE COURT: Okay.

17 MR. MURPHY: I know we talked to our local
18 counsel, our U.K. counsel about that, and I just don't
19 recall what he told us.

20 THE COURT: All right. All right. Go ahead.

21 MR. MURPHY: Okay. I think lastly, Judge, and
22 you alluded to it immediately when you came out here, is
23 that they're asking this Court to shut down a complete U.K.
24 litigation for patent infringement in the U.K. It's an
25 extremely broad and aggressive remedy that violates comity

1 and it also violates the Third Circuit's approach.

2 THE COURT: Yes. You know, I think that comity
3 issue is -- you know, one thing I noticed about Judge Rufe's
4 opinion was that the tone was very much respect for a,
5 what's essentially an equal court in a different country.

6 I'm not so sure how much -- well, never mind.
7 Go ahead.

8 MR. MURPHY: Show quite a bit of deference to
9 those courts. But as to -- the General Electric case even
10 says, you know, that respect for comity encourages the rule
11 of law, and that's what we want. Parallel proceedings are
12 allowed at least until one is set up as res judicata in the
13 other, so it would be very premature. The injunction is
14 much too broad. Keep in mind here, it's important that
15 ZyXel relies principally on the Ninth Circuit case or the
16 Microsoft versus Motorola, but even in that case, as that
17 Court stated, it was a very, very narrow injunction, and all
18 it said was, it was going to stop Motorola from filing the
19 bond necessary.

20 THE COURT: Well, and, you know, I'm glad you
21 mentioned that, because I read the briefing and I have been
22 doing this long enough now so I ought to know where I should
23 start, and I should have started with the proposed order.
24 That's where I ended. And it seems to me that the proposed
25 order greatly exceeded what is defendant's best day could

1 possibly be entertained, because it seemed as though respect
2 for other Courts, and other Courts in other countries,
3 requires the narrowest possible injunction if you find it
4 necessary to issue one, and that here, the narrowest
5 possible injunction is probably something like that the
6 injunction -- any injunction that were to be issued would
7 have no territorial effect in the United States, something
8 like that. And I guess I'm actually the wrong person here.
9 But I take it you agree with that?

10 MR. MURPHY: We agree -- of course, we agree any
11 injunction --

12 THE COURT: I understand.

13 MR. MURPHY: But, yes. The very narrowest
14 possible injunction. But keep in mind, it was something
15 interesting Ms. Rader said. They said, well, if the rate is
16 right, then I guess the injunction would apply in the United
17 States. So they still want to hedge their bets.

18 THE COURT: Well, no. No. That's one of the
19 things, you know, Mr. Murphy, I expect the answer sitting at
20 the table, but you're the one that's standing up. If you
21 made a FRAND offer, they didn't think it was a FRAND offer,
22 they made a FRAND offer, you didn't think it was a FRAND
23 offer. Why don't you find some neutral party who can
24 quickly decide what a FRAND offer is and live with it?

25 I don't know how much money is actually at stake

1 here. Maybe it's, you know, nine figures or ten figures or
2 something, but it just seems -- if it's just hanging over
3 dollars here, pounds, or something, and there must be a
4 cheaper way to resolve this than the way that you are doing
5 it.

6 MR. MURPHY: Judge, part of the FRAND bargain
7 is, you know, the standard essential patent owner's
8 commitments, but it's also the commitments of the
9 implementers of the standards. ZyXel here doesn't even
10 acknowledge that our patents are standard essential. They
11 won't acknowledge that they practice the standard.

12 THE COURT: Well, but as the U.K. Judge said,
13 did they make you an offer at some point?

14 MR. MURPHY: You know, I was not part of this
15 negotiation. Mr. McAndrews can answer that more directly,
16 and I will try to answer the question, Judge. There was
17 some back and forth, but they effectively would not
18 negotiate with us in good faith.

19 THE COURT: No. I'm not asking. You know, make
20 that an issue for another day. I'm not interested in
21 getting the entire history, and maybe I should because I've
22 asked the question, but it just seemed to me that if, in
23 fact, as the U.K. Judge said, and I assume he, I mean, I
24 know he had a basis for saying it, is that both sides say
25 they have made an offer, and I'm just wondering if that's

1 actually correct, why instead of litigating on two
2 continents, parties don't figure out some way to get, to
3 reach that midpoint where, you know, which may not be a
4 midpoint rather than -- well, in any event, I'm not
5 expecting you to answer that, Mr. Murphy.

6 Mr. McAndrew, why don't you sit down for a
7 second.

8 MR. McANDREWS: Sure.

9 THE COURT: Let me finish this. Is there
10 anything else, Mr. Murphy.

11 MR. MURPHY: That's it. I'd like to take a
12 quick rebuttal.

13 THE COURT: Okay. Usually, a response, two,
14 three.

15 MR. MURPHY: Okay.

16 THE COURT: So why don't we do this. Why don't
17 you have a seat.

18 Mr. McAndrews, if there's stuff you want to
19 throw in on the collateral issues which is stuff that
20 Mr. Murphy has not dealt with, go ahead.

21 MR. McANDREWS: Yes, Your Honor, and I will be
22 as brief as I can be.

23 So on the question about the negotiations, and I
24 understand the Court's reluctance to get into too much what
25 may be 408 discussions between the parties, but one of the

1 major problems with the, with attempting to reach the
2 approach you described, which we believe would be a very
3 reasonable approach, the problem is that to the extent ZyXel
4 has offered anything, what they have offered is a rate, but
5 always couched in terms of, we will only pay that rate where
6 you have proven that you have an infringed patent that
7 remains valid in any jurisdiction on the planet. So the
8 rate only applies in each nook and cranny of the earth that
9 we then go and prove a full infringement case. And that's
10 not, that's not the FRAND bargain. The FRAND bargain is
11 that the parties want to arrive at a rate --

12 THE COURT: All right.

13 MR. McANDREWS: Okay. So there's that. I just
14 wanted to add one other thing, because maybe Ms. Rader can
15 address this. But you had asked a question about whether
16 there would be any impact of injunction entered in the U.K.
17 anywhere outside the U.K., and as Mr. Murphy said, our
18 understanding is that there will be no impact at all. And
19 we can, and if Your Honor would prefer, we can get some
20 authority from our U.K. counsel just to -- we can get that
21 in in the next couple days just to make sure that you
22 understand that to be the case. Our understanding though is
23 that an injunction entered in the U.K. would have no impact
24 outside the territory of the U.K., and including, and this
25 is why I wanted to say it before Ms. Rader gets up.

1 The products we understand are not made anywhere
2 near the U.K., and so products sold in the U.S. don't, are
3 not made in the U.K., so an injunction wouldn't impact them
4 that way and they don't transit through the U.K. is our
5 understanding. So an injunction in the U.K. would have zero
6 impact on U.K., on ZyXel's sales in the United States.

7 THE COURT: All right. Thank you,
8 Mr. McAndrews.

9 Ms. Rader?

10 MS. RADER: Thank you, Your Honor. I will try
11 to be brief.

12 My first point is at the beginning of
13 Mr. Murphy's argument, I heard a concession that I wasn't
14 expecting to get, that the enforcing RAND really is an
15 important public policy, so I just wanted to note that.
16 That's I guess no longer in dispute in this motion.

17 Second, speaking about the Apple versus Motorola
18 case, it is fairly important because it's a Federal Circuit
19 case. It did say there was no blanket per se rule against
20 denying an injunction, against granting an injunction, but
21 if you go on and read the next section of that case, it
22 actually upheld the denial of an injunction in the Apple
23 versus Motorola case. It did say you could apply the
24 traditional injunction factors asset out in eBay and that's
25 why we briefed those factors, including irreparable harm.

1 The third point I want to make is about the
2 restrictive approach. There are different species of
3 restrictive approach in the Third Circuit, the Second
4 Circuit and the Sixth Circuit. The General Electric case
5 just does not say that the first case has to be dispositive
6 of the second case. I've read it. I read the section that
7 is cited in TQ Delta's brief and then I went back and cite
8 checked it and read every Third Circuit case and every
9 District Court case that cites General Electric for the
10 anti-injunction suit point and they all don't set out any
11 kind of restrictive requirement that requires the one case
12 be dispositive of the other one. It's just not there. They
13 all talk about the res judicata point at that cite.

14 Your Honor asked a question about why we're not
15 going to arbitration or mediation. The answer is it's a
16 business decision, so it shouldn't have any effect on how
17 you decide this motion.

18 THE COURT: No. I think that's right.

19 MS. RADER: I think I have a factual correction
20 for TQ Delta. I wasn't involved in discussions of patent
21 negotiations myself, but I'm pretty confident that even
22 though our position in our pleadings is that we'll take a
23 FRAND license on patents that are proved to be essential,
24 valid and infringed, in the patent negotiations for a
25 license, everybody was talking about a global license for

1 all the patents in the portfolio.

2 THE COURT: That would certainly be the
3 reasonable business decision approach, I'm sure.

4 MS. RADER: Unless the Court has any further
5 questions, I will sit down.

6 THE COURT: I think I asked Mr. Murphy, and you
7 may actually not be in quite as good a position to even
8 answer, but do you have any sense of what the timing is for
9 this Unwired Planet appeal?

10 MS. RADER: No, I don't.

11 THE COURT: Okay.

12 MS. RADER: I have a sense it will take a long
13 time, but I don't know exactly what that means.

14 THE COURT: Okay. All right. And so
15 Mr. McAndrews said the U.K. counterparts say that the effect
16 of the injunction, if there were to be one, is limited to
17 the U.K., and he said he was supplied presumably from the
18 U.K. counterpart authority to back up that statement. Is
19 your position different?

20 MS. RADER: No. I think we would agree with
21 that, and we would certainly fight to prevent that
22 injunction from being enforced in the U.K.

23 THE COURT: Well, that enforcement in the U.K.,
24 that's definitely not my concern.

25 MS. RADER: I meant enforced in the U.S. I

10:46:39 1 misspoke.

10:46:39 2 THE COURT: Sorry. All right. So they are
10:46:44 3 saying it's only good in the U.K. You are saying you don't
10:46:49 4 want to see it at all, but if you do want to see it, you
10:46:52 5 want it to only apply to U.K. So, okay.

10:46:58 6 And do you agree with Mr. McAndrews' sort of
10:47:07 7 second point there, which is, so an injunction in the U.K.,
10:47:11 8 that may cause, or he didn't say this. That may cause large
10:47:18 9 business interruption, disruption for ZyXel U.K. and ZyXel
10:47:22 10 Denmark, but in terms of the product that you sell here,
10:47:33 11 they would not be impacted because they're not manufactured
10:47:36 12 in Great Britain and they don't transit Great Britain.

10:47:40 13 Do you have any reason to disagree with that?

10:47:42 14 MS. RADER: It's hard to assess the impact
10:47:44 15 except to say that ZyXel U.K. and ZyXel Denmark are part of
10:47:49 16 this larger ZyXel group.

10:47:51 17 THE COURT: But that is a different kind of
10:47:53 18 impact I think to say if we got an adverse judgment against
10:48:01 19 us in the U.K., that would hurt our sister companies, and
10:48:06 20 because they're all kind of related, it might hurt us, too.
10:48:10 21 That's one thing. It's a different thing, I think, to say
10:48:17 22 if the U.K. enjoined these two companies, that would disrupt
10:48:24 23 our operations in the U.S. because we could no longer get
10:48:28 24 materials made or we could no longer get materials
10:48:31 25 delivered?

1 Do you see what I'm saying?

2 MS. RADER: I see what you are saying, but the
3 fact is, these products are not designed country by country.
4 And the products sold in the U.K. I believe are made in
5 China and so they would have to change all kinds of
6 different products because --

7 THE COURT: Well, so, but if they change, you
8 know, if the manufacturing in China -- if you all wanted to
9 change it because you had an adverse judgment in the U.K.,
10 that would be just a business decision on your part, right,
11 as opposed to you manufacture these things outside of London
12 and your manufacturing plant gets shut down by an
13 injunction. That's really what I was driving at.

14 MS. RADER: Sure. I would say anything is
15 relative, but the threat to ZyXel Corporation includes this
16 huge sort of Damocles hold hanging over the U.K. I want to
17 point out that the Microsoft Court considered the threat in
18 Germany to be significant enough and to be a violation of
19 the ITU obligations. That was enough to grant an injunction
20 halting the German litigation for a while.

21 THE COURT: Okay. All right.

22 MS. RADER: Additionally, the remedy is the
23 Microsoft case included damages caused by the German action,
24 including Microsoft had to shut down one of its facilities
25 in Germany. So it's enough to make the Court take notice,

1 at least in the Microsoft case.

2 THE COURT: Okay. Thank you.

3 MS. RADER: Thank you.

4 THE COURT: All right. Well, so we're done.

5 Right?

6 MR. MURPHY: Yes, Your Honor.

7 THE COURT: Okay. So I'm going to take this
8 under advisement in the sense that I will write some order.
9 I doubt that it will be very long. And I don't think
10 there's any necessity for expedition, so it will happen in
11 due course. And so that's the end of that.

12 All right. So when is the next time now that
13 I'm supposed to see you, at least see you all? Is it like
14 some time like the second week of January?

15 MR. McANDREWS: January 10th, Your Honor.

16 THE COURT: Okay. And I recognize that two of
17 the three defendants are not here right now. I need to --
18 there were some scheduling issues, one of which was which
19 defendants were going to handle which formal Zhone trials,
20 and my impression is that the defendants amongst themselves
21 had worked out who they wanted to have handle which trial,
22 and I couldn't tell from the scheduling order, does TQ Delta
23 care which defendant handles which trial?

24 MR. McANDREWS: Your Honor, no, but with one
25 exception that would lead to some efficiency here. If you

1 recall, Adtran has explained to the Court, including when
2 they filed the motion for summary judgment on the issue of
3 license, they explained that the vast majority of their
4 products use Lantek/Intel chips as opposed to some of the
5 other chip suppliers.

6 THE COURT: Right.

7 MR. McANDREWS: And one of the patent families
8 that TQ Delta concedes that they have a license to for
9 Lantek chips is Family 4. It's also 4, 5 and 6. But the
10 families that they don't have a license to for which they
11 claim was the vast majority of the products at stake in the
12 case that use Lantek chips are Families 2, 8 and 9 and so
13 from TQ Delta's perspective, it would have been most
14 efficient to try 2, 8 and 9 against Adtran before we start
15 loading up to some of these less significant families like
16 Family 4 for them. So if we had a preference, we would have
17 2Wire and ZyXel divide up Family 4, 5 and 6, and then we
18 would wrap around --

19 THE COURT: But Adtran has some, so to speak,
20 interest in at least one of these families 4, 5 and 6,
21 whichever one it is they are going to do, because I presume
22 they're not going to go to trial over a family in which they
23 have no accused products.

24 MR. McANDREWS: I didn't mean to -- so they have
25 a few accused products, but the relative scale is, according

1 to Mr. Sykes, is, you know, three percent of the total of
2 their sales. The vast majority of what's at stake in the
3 case in Lantek.

4 THE COURT: All right. It seems to me I'm going
5 to let the defendants decide which order they do things, so
6 I'm going to go with defendants' suggestion on that.

7 Something else. I don't want to talk about it
8 because all the parties are not here right now, but I also
9 have to decide whether I'm going to rearrange trials 1, 2
10 and 3, and that is tied in with the, or possibly tied in
11 with the question of substituting patents.

12 Are there any other scheduling issues other than
13 those two that are left for me to decide?

14 MR. McANDREWS: I believe the parties are able
15 to work out essentially everything else. I think you picked
16 the two that --

17 THE COURT: Okay. All right. All right. Well,
18 thank you very much. Have a nice holiday. I will see you
19 all in the New Year.

20 (Hearing concluded at 11:05 a.m.)

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